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SEP - 8 2005

For The Northern Mariana Islands
 By _____
 (Dwyer, Clark)

6 Attorney for Defendant
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**IN THE UNITED STATES DISTRICT COURT
 FOR THE
 NORTHERN MARIANA ISLANDS**

9	UNITED STATES OF AMERICA) CRIMINAL ACTION NO. 05-0023
10	Plaintiff)
11	v.) DEFENDANT'S MEMORANDUM
12) SUPPORTING MOTION TO SEVER
13	JUAN QUITUGUA) TRIAL ON COUNT 3
14	Defendant) Date: Oct. 6, 2005
15) Time: 9:00 a.m.

**I. JOINING COUNT 3 IN THE SAME INDICTMENT WITH COUNTS 1 AND 2 IS
 IMPROPER UNDER FRCrP RULE 8**

18 FRCrP Rule 8 provides that an indictment:

19 ... may charge a defendant in separate counts with 2 or more offenses if the
 20 offenses charged--whether felonies or misdemeanors or both--are of the same
 21 or similar character, or are based on the same act or transaction, or are
 22 connected with or constitute parts of a common scheme or plan.

22 The validity of the joinder of two or more counts is determined solely by the allegations in the
 23 indictment. *United States v. Terry*, 911 F.2d 272, 276 (9th Cir.1990) Reversal under Rule 8 is
 24 required where the misjoinder of counts results in actual prejudice because it 'had substantial
 25 and injurious effect or influence in determining the jury's verdict.' " *Id* at 277 quoting *United*

States v. Lane, 474 U.S. 438, 449, 106 S.Ct. 725, 732, 88 L.Ed.2d 814 (1986). *Terry*, like the indictment in this case, joined drug charges with a charge for unlawful possession of a firearm. The 9th circuit reversed finding the joinder was improper. *Id* at 277. *Terry*'s rationale applies in this case which should result in severance of count 3 from counts 1 and 2.

B. IF THE COURT FINDS JOINDER IS PROPER UNDER RULE 8, THEN TRIAL ON COUNT 3 SHOULD BE SEVERED FROM THE TRIAL ON COUNTS 1 AND 2 PURSUANT TO FRCRP RULE 14

9 FRCrP Rule 14 allows for severance if it appears that the joinder of offenses in an
10 indictment prejudices a defendant. Severance under Rule 14 is proper when a risk of undue
11 prejudice exists which impacts a specific right of a defendant such as the right to a fair trial.

United States v. Lewis, 787 F.2d 1318, 1322, amended, 798 F.2d 1250 (9th Cir.1986) In this case, trying count 3 together with counts 1 and 2 will deprive Quitugua of a fair trial as the spill over effect of the evidence relating to distribution of contraband in counts 1 and 2 will unduly prejudice the jury with respect to the elements of count 3 and deny Quitugua a fair trial. See *Id.*

CONCLUSION

20 Rules 8 and Rule 14 each require severance of the trial on count 3 from the trial on counts
21 1 and 2.

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By: ~~G. Anthony Long~~